**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

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| JOHN R. PERRY,<br>Appellant,<br><br>v.<br><br>UNITED STATES POSTAL SERVICE,<br>Agency. | DOCKET NUMBER<br>DC07528910053<br><br><br><br>DATE: DEC - 6 1990 |

Michael Sindram, Washington, D.C., for the appellant.

Willie Ruth Gray, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

**OPINION AND ORDER**

For the reasons discussed in this Opinion and Order, the Board DENIES the appellant's petition for review of the initial decision issued on January 26, 1989, which sustained his removal, because the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, to address the appellant's affirmative defense of reprisal. We AFFIRM the initial decision as MODIFIED by this Opinion and Order, still sustaining the appellant's removal.

## BACKGROUND

The appellant timely filed a petition for appeal from the agency decision removing him from his position as a Supervisor of the Mails. The agency based its removal action on the appellant's unacceptable conduct, specifically sexual harassment of female casual employees in violation of Part 666.2 of the Employee and Labor Relations Manual and Postal Service policy regarding sexual harassment. *See* Initial Appeal File (IAF), Tab 3, Sub-tabs 12-14.

In his petition for appeal, filed October 24, 1988, the appellant simply stated that he was appealing the letter of decision. He did not request a hearing in his petition or in response to the Board's acknowledgment order informing him that he had 10 days to do so. *See* IAF, Tabs 1 and 2. The agency response was timely submitted, and the administrative judge informed the parties that a telephonic status conference would be conducted on November 28, 1988, and that the record would close on December 3, 1988. *See* IAF, Tab 4. Because the agency had difficulty contacting the appellant and his representative, the administrative judge rescheduled the status conference from November 28, 1988, to December 5, 1988. *See* IAF, Tabs 5 and 6.

During the status conference, the appellant requested a hearing. The administrative judge denied the appellant's request as untimely, but she reopened the record for 2 weeks for receipt of written submissions. *See* IAF, Tab 6. In response, the appellant filed a written request for a

hearing, alleging that he had mailed an earlier request on November 7, 1988, and that the agency was not answering his interrogatories or requests for documents. *See* IAF, Tabs 7 and 8. The appellant also claimed that: The agency witnesses had been coerced by the agency to make statements regarding the appellant's sexual activity with casual employees;[1] other supervisors were also involved in transporting casual employees to the appellant's home in order to elicit sexual favors; the appellant was coerced into such activity; and after he terminated such activity he contacted his congressman, but then was removed in spite of his exemplary performance. *See* IAF, Tab 8. The appellant also asserted, *inter alia*, that the evidence against him was "manufactured" and that his removal was in reprisal for his contacting his congressman concerning his "employment problems" with the Postal Service. *See* IAF, Tabs 8 and 10.[2]

In the initial decision, the administrative judge affirmed the agency action. She noted that the appellant did not request a hearing in his petition for appeal, did not respond to the acknowledgment order which instructed him to request a hearing within 10 days if he wanted one, and did not inform the administrative judge that he wanted a hearing until December 5, 1988, 2 days after the date

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[1] Here the appellant apparently is referring only to allegations of sexual harassment made after he terminated coerced sexual activity with casual employees at his home.

[2] After the record closed, the appellant also submitted a closing statement and a supplemental answer which were rejected as untimely by the administrative judge.

originally set for the close of the record. The administrative judge found unpersuasive the appellant's arguments that he made a timely request for a hearing on November 7, 1988, and that the address used by the Board for service on him was incorrect. She noted that the appellant had not submitted an affidavit explaining the circumstances surrounding the alleged mailing of his request for a hearing, that the appellant had provided an incorrect address to the Board, and that, regardless of this, the evidence did not show that he did not receive the material sent him by the Board. She found that the appellant was negligent in not ensuring that his request for a hearing was mailed to the proper address for the Board and in failing to participate in the processing of the case. Accordingly, she found that the appellant waived his right to a hearing.

The administrative judge also found that the agency charge of unacceptable conduct was supported by a preponderance of the evidence. She noted that, while the appellant argued that the agency's witnesses's statements were false, he submitted no additional statements for the Board's consideration. The administrative judge found that the statements of the agency's witnesses were more believable than the appellant's denial that he committed the misconduct and that it was inherently improbable that the four females would file similar false complaints. Therefore, she found that the witnesses's statements clearly established that the harassing conduct occurred, that it was

unwelcome, that it was of a sexual nature, and that it created an offensive working environment. Accordingly, she found that the agency had met its burden of proof. Further, she found that the agency considered relevant factors in making its penalty selection and that, in view of the appellant's supervisory position and in the absence of apparent mitigating factors, the selected penalty was within reasonable limits. The administrative judge made no finding concerning the appellant's charge of reprisal.

The appellant has filed a timely petition for review[3] in which he alleges that: The administrative judge erred because the appellant did not waive his request for a

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[3] After the close of the record, the appellant filed additional submissions, including a reply to the agency's response and an appeals examiner's decision regarding the appellant's claim for District of Columbia (D.C.) unemployment compensation. We have not considered the appellant's reply to the agency's response because the appellant has not shown that it is based on previously unavailable, new and material evidence. 5 C.F.R. § 1201.114(i). We have not considered the D.C. appeals examiner's decision because it is not material to the disposition of the appellant's Board appeal. We note that the D.C. appeals examiner found that the appellant could not be disqualified from unemployment compensation benefits because the agency's witness had no first-hand knowledge of the appellant's alleged actions; he testified to the statements of victims of the appellant's sexual harassment. Such hearsay evidence before the D.C. appeals examiner would have been admissible before the Board because strict adherence to the Federal Rules of Evidence is not mandatory in our administrative proceedings. *See, e.g., Shrider v. United States Postal Service*, 36 M.S.P.R. 650, 655 (1988). In any event, absent a showing of material evidentiary conflict or clearly erroneous legal decisions, mere inconsistency in result between the D.C. appeals examiner's decision and the decision of the Board's administrative judge constitutes no persuasive basis for further Board review. *See, e.g., Shelton v. Department of Labor*, 38 M.S.P.R. 1, 2 (1988); *Ahr v. Department of Justice*, 23 M.S.P.R. 238, 242 (1984).

hearing, and, in fact, had timely requested a hearing; the facts do not support his removal in light of the agency's failure to report his allegedly criminal conduct; he was denied his right to discovery because the agency did not answer his interrogatories; and the administrative judge was biased. The appellant also has reiterated his claims that his removal was in reprisal for his contacting his congressman.

## ANALYSIS

The appellant's assertions, excepting his claim of reprisal, constitute mere disagreement with the administrative judge's findings and do not provide any basis for Board review. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*).

The record evidence belies the appellant's assertion that he had timely requested a hearing, and the appellant has submitted no evidence to contradict the administrative judge's conclusions that he was negligent in not pursuing the processing of his appeal. The record shows that the appellant was on notice of the 10-day filing deadline for requesting a hearing, *see* IAF, Tab 2, and that he did not contact the administrative judge before the close of the record. ,*See* IAF, Tab 6. The appellant has not shown error in the administrative judge's conclusion that the alleged copy of the November 7, 1988 letter was insufficient to show

that he timely and properly requested a hearing. *See* Initial Decision at 3. Under the circumstances of this case, the administrative judge correctly found that the appellant did not timely act to preserve his statutory hearing right and that his omission did constitute an implied waiver of that right. *See Brown v. Department of the Navy*, 21 M.S.P.R. 204, 205-06 (1984).[4]

The appellant's argument regarding the agency's failure to report the allegedly "criminal" conduct, *i.e.*, the sexual harassment, to the Postal Inspection Service is also without merit. The appellant argues that the agency's apparent decision not to report the behavior shows that there were no "grounds to constitute sexual harassment." An agency, however, does not have to tolerate all behavior until the law has been violated before it enforces policy statements requiring certain workplace behavior. *See Carosella v. United States Postal Service*, 816 F.2d 638, 643 (Fed. Cir. 1987); *Tyler v. Department of the Army*, 38 M.S.P.R. 85, 90 (1988).

The record shows that the agency submitted statements by various witnesses which the appellant claimed were false, but which the administrative judge found credible, and that the appellant submitted no evidence which would establish

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[4] We note that the administrative judge erroneously cited "*Brown*" as "*Morgan v. Department of the Navy.*" Because the rest of the citation was correct, however, this error has not adversely affected the appellant's substantive rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

otherwise. Thus, we find that the appellant has submitted nothing which would tend to dispute the agency's evidence showing that the appellant's conduct, found offensive by several employees, and impacting on other employees' work habits, was sufficiently severe or pervasive to create an abusive working environment. *See Howard v. Department of the Air Force*, 877 F.2d 952, 955 (Fed. Cir. 1989) (for purposes of an adverse action, an employee's conduct can create an abusive working environment, even though the other employees' psychological well-being is not currently affected, if such conduct is of such severity that, if allowed to continue, it would seriously affect the psychological well-being of other employees); IAF, Tab 3, Subtab 7. The administrative judge correctly determined that the facts support the appellant's removal and that the agency satisfied its burden of establishing by a preponderance of the evidence that the alleged harassing conduct occurred. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 463 (1987).

The appellant's claim that he was denied his right to discovery because the agency did not answer his interrogatories is without merit in light of his failure to pursue his discovery request until after the close of the record. We note that the acknowledgment order informed the appellant of the procedures under 5 C.F.R. §§ 1201.71-1201.85, but that the appellant did not show that he, in fact, had submitted a discovery request to the agency. *See*

IAF, Tabs 2 and 6. Since he failed to take advantage of the procedures open to him prior to the close of the record, the appellant cannot now claim injury. *See Armstrong v. United States Postal Service*, 28 M.S.P.R. 45, 48 (1985).

The appellant's assertion that the administrative judge was personally and emotionally involved and therefore biased is nothing more than an unsubstantiated claim, also reflecting his disagreement with the administrative judge's findings. *See Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980) (in making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators).

We reopen this appeal, however, because we find that the appellant raised an affirmative defense of reprisal and the administrative judge failed to address it.[5] Thus, the initial decision fails to conform to Board regulations which require that all issues, legal and factual, be addressed and resolved. *See Morey v. Department of the Navy*, 34 M.S.P.R. 97, 100 (1987); *Spithaler v. Office of Personnel Management*,

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[5] The appellant's retaliation claim is not subject to the standards of the Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16, 34 (1989). The Act's savings clause, as interpreted by the Board's regulations set forth at 5 C.F.R. § 1201.191(b), does not give employees the right to appeal to the Board an action that was taken before July 9, 1989, the effective date of the Act. *See, e.g., Herring v. Department of the Treasury*, 44 M.S.P.R. 673, 675-76 (1990). The agency's removal action here was effective October 14, 1988.

1 M.S.P.R. 587, 589 (1980). We shall remedy this error here, however.

In order for an appellant to prevail on a contention of illegal retaliation, he has the burden of showing that: (1) A protected disclosure was made; (2) the accused official knew of the disclosure; (3) the adverse action under review could, under the circumstances, have been retaliation; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *See Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986); *Heller v. Department of the Air Force*, 28 M.S.P.R. 35, 41 (1985), *aff'd*, 795 F.2d 1019 (Fed. Cir. 1986) (Table). The appellant here claimed that he was removed soon after he informed his congressman about the alleged sexual misconduct of agency supervisors, including the appellant himself. *See* IAF, Tab 8. He has not submitted any evidence that shows, however, that the agency removed him in reprisal for writing his congressman. Although he alludes to the timing of the removal as showing retaliation, he has presented no evidence to support his contention that his letter-writing activity was a motivating factor for his removal.

In light of the appellant's failure to show any causal connection between his correspondence with his congressman and his removal, and in light of the agency's evidence supporting the charge of sexual misconduct, we find that the appellant has failed to carry his burden of proving, by a

preponderance of the evidence, that the agency engaged in reprisal against him. *See* 5 C.F.R. §§ 1201.56(a)(2)(iii) and (b)(2).

ORDER

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.